

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

BRUCE COLER,)	
)	
Claimant,)	IC 01-512468
v.)	
)	
IDAHO DEPARTMENT OF CORRECTIONS,)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
Employer,)	AND RECOMMENDATION
and)	
)	
IDAHO STATE INSURANCE FUND,)	FILED DEC 14 2004
)	
Surety,)	
Defendants.)	
_____)	

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned this matter to Referee Douglas A. Donohue. He conducted a hearing in Lewiston, Idaho, on March 22, 2004. Scott Chapman represented Claimant. H. James Magnuson represented Defendants. The parties presented oral and documentary evidence. They then submitted briefs. A post-hearing deposition was submitted December 2, 2004. The case is now ready for decision.

ISSUES

As modified and agreed upon by the parties at hearing, the issues to be resolved are:

1. Whether the condition for which Claimant seeks benefits was caused by the industrial accident;
2. Whether apportionment for a pre-existing condition pursuant to Idaho Code § 72-406 is appropriate;
3. Whether and to what extent Claimant is entitled to the following benefits:
 - a) permanent partial impairment (PPI);
 - b) disability in excess of impairment;
 - c) retraining; and
 - d) medical care;

4. Whether Claimant is entitled to permanent total disability pursuant to the odd-lot doctrine; and
5. Whether Claimant is entitled to attorney fees.

The issues of apportionment, retraining and medical care were not addressed by the parties in briefing and are deemed withdrawn by the parties.

CONTENTIONS OF THE PARTIES

Claimant alleges that he sustained a knee injury while working as a correctional officer for Employer and is entitled to impairment and disability. He is entitled to permanent total disability pursuant to the odd-lot doctrine and should be awarded attorney fees.

Defendants agree that there was a work-related injury and accept the rating of 15% PPI of the whole person given by treating physician, Marvin Renell Kym, M.D. However, disability in excess of impairment is minimal, if any, and does not entitle Claimant to permanent total disability under the odd-lot doctrine. Defendants have not acted unreasonably.

EVIDENCE CONSIDERED

The record in the instant case consists of the following:

1. Hearing testimony of Claimant, Bruce Coler; Lori Marlene Mechling, administrative assistant at the Idaho Correctional Institute; Chris Puckett, vocational consultant for the Industrial Commission Rehabilitation Division (ICRD); and William C. Jordan, private vocational rehabilitation consultant;
2. Claimant's Exhibits A through L, and N;
3. Defendants' Exhibits 1 through 17; and
4. Post-hearing depositions of treating physician, Marvin Renell Kym, M.D. and Debra Uhlenkott, vocational rehabilitation counselor.

After considering the record and briefs of the parties, the Referee submits the following findings of fact, conclusions of law, and recommendation for review by the Commission.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 2

FINDINGS OF FACT

1. At the time of the accident, Claimant was 48 years of age and working for Employer as a correctional officer. He received a high school diploma and attended Boise State University for one year and Metropolitan College in Denver for one year. He worked for Employer since 1989 and at the Orofino facility since 1990. He previously worked jobs such as forklift driver, security policeman and appliance repairman. In 1995, he injured his knee at work. He filed a worker's compensation claim and received benefits. He returned to work without any restrictions or further problems.

2. On July 29, 2001 Claimant injured his knee at work when he fell while attempting to sit in a high, wheeled chair with a loose seat. Claimant properly and promptly notified his shift supervisor and was then sent to Clearwater Valley Hospital.

3. X-rays were taken and Claimant was restricted from work. After weekly follow-up visits, Claimant returned to work at his pre-injury position in four weeks. After three months of "full normal duty" Claimant noted constant swelling and pain.

4. Claimant's family doctor, Dr. Petersen, referred Claimant to Marvin Renell Kym, M.D. After an arthroscopic procedure on September 26, 2001, Dr. Kym performed an OATS procedure, a cartilage graft, on January 21, 2002, and ultimately a total left knee replacement on March 21, 2003. Claimant complained of continuing symptoms after each procedure.

5. Claimant's restrictions – or lack of them – varied after the first two procedures. Employer tried to accommodate Claimant's restrictions. Claimant was unable to tolerate work with these accommodations.

6. Claimant did not return to work after the knee replacement. He believes Warden Fosbury offered him a choice of two positions, although Ms. Mechling testified she was "not

aware” these positions were actually offered. Claimant had tried one of these positions after the OATS procedure. Claimant believes these are beyond his restrictions and that Dr. Kym told him he could never return to prison work. Dr. Kym’s testimony differs. Claimant’s condition makes him vulnerable in the event of an inmate attack.

7. On August 7, 2003, Dr. Kym opined Claimant medically stable, rated him at 15% whole person PPI, and released Claimant to work. Dr. Kym testified Claimant’s permanent restrictions included lifting no more than 50 pounds occasionally and 20 pounds regularly, no kneeling or squatting, and a caution against putting force on the knee when bent. Dr. Kym approved three positions with Employer – two of which were discussed by Warden Fosbury with Claimant – as well as other positions as described to him. Claimant believes he has not been released to return to work.

8. Claimant identified four job applications that he made since his knee replacement. In 2002, Claimant stated he intended to take early retirement or medical disability. He receives retirement benefits.

9. Claimant now has intermittent knee pain, but less and without swelling. He has gained about 50 pounds due to inactivity. He has attempted to follow his medical restrictions.

10. Employer does not maintain permanent “light duty” positions. Employer considers light duty to be a temporary accommodation accompanied by a medical expectation of a release to full duty to be issued at or before the end of six months. Employer’s ability to accommodate restrictions is limited by the nature of prison work and security considerations.

11. Claimant did not put himself on Employer’s layoff register to become eligible to be considered for positions at Employer’s Orofino facility.

12. ICRD consultant Chris Puckett assisted Claimant with job placement but

closed her file after Claimant failed to follow up on leads she provided. She was aware of only one job he had sought on his own. She found various positions appropriate for Claimant including: compliance officer with the Industrial Commission; security system coordinator at the University of Idaho or Washington State University; and a casino guard surveillance system monitor. Starting hourly wage for the Commission in compliance was \$10.31. The hourly wage at the university was \$15.00; the casino position, \$11.25. At the time of injury, Claimant earned \$14.39.

13. Ms. Puckett identified several jobs within and without the criminal justice system which were within Claimant's restrictions as set forth in Dr. Kym's July 7, 2003, correspondence to her. Those restrictions were more limiting than the permanent restrictions Dr. Kym testified to in his post-hearing deposition.

14. William C. Jordan evaluated Claimant's employability at Defendants' request. He opined Claimant has permanent restrictions for sedentary to light exertional activities. This represents a loss of access to a portion of the job market. However, Claimant is capable of becoming employed without a wage loss. He opined Claimant's permanent disability at 30% to 50% depending upon whether he could return to correctional officer work with Employer.

15. Mr. Jordan opined that Claimant's current receipt of benefits "represent a possible disincentive for the Claimant to pursue and/or return to employment."

16. Debra J. Uhlenkott assessed Claimant's employability at Claimant's request. She concluded that Claimant is unable to sustain employment in any occupation. She emphasized Claimant's age and weight among the factors she considered.

DISCUSSION AND FURTHER FINDINGS

17. **Causation and Permanent Partial Impairment.** Here, Claimant and

Defendants agree that there has been a work-related accident. Defendants paid medical and income benefits. Moreover, Defendants accept liability for Dr. Kym's PPI rating of 15%.

18. **Permanent disability.** Disability and its evaluation is defined by statute. Idaho Code §§ 72-102(10), 72-423, 72-425, 72-430. A claimant must prove by a preponderance of the evidence, that he sustained a loss of earning capacity or a reduced ability to engage in gainful activity. Ball v. Daw Forest Products Company, 136 Idaho 155, 30 P.3d 933 (2001).

19. Dr. Kym has followed and treated Claimant through the entire chain of events. His opinions are persuasive. His restrictions appear reasonable as do his expectations about sedentary work. Ms. Puckett applied Dr. Kym's restrictions and found numerous positions for Claimant with hourly wages which ranged from \$8.00 to \$15.00. Claimant's failure to secure reasonable work is attributable to his unwillingness to seek work.

20. Mr. Jordan identified jobs at or above Claimant's pre-injury wage as well as several below. Nevertheless, considering all factors, he opined disability at 30-50%. Ms. Uhlenkott's opinion describing Claimant as totally and permanently disabled is not persuasive in the face of specific jobs identified by the other experts. Her opinion is based in part upon Claimant's representations which are not entirely credible given his demonstrated unwillingness to actively seek a job.

21. In sum, considering all medical and non-medical factors, Claimant has shown his present and probable future ability to engage in gainful activity has been reduced. Claimant suffered permanent disability, inclusive of PPI, rated at 30% of the whole person.

22. **Total and permanent disability and the odd-lot doctrine.** For workers' compensation purposes, total disability means a claimant's inability to sell his or her services in a competitive market. Hamilton v. Ted Beamis & Logging Const., 127 Idaho 221, 899 P.2d 434

(1995). A claimant need not be incapable of all work to qualify as totally and permanently disabled. As explained above, Claimant's permanent disability is not rated at 100%.

23. The second avenue by which a Claimant can be deemed totally and permanently disabled is the odd-lot doctrine. An employee may prove total disability under the odd-lot doctrine by meeting any one part of a three-pronged test. He may show that he has attempted other types of employment without success, that he or vocational counselors or employment agencies on his or her behalf have searched for other work and other work is not available, or that any efforts to find suitable employment would be futile. Boley v. State, Industrial Special Indemnity Fund, 130 Idaho 278, 939 P.2d 854 (1997).

24. Here, Claimant has not significantly attempted other employment. After his total knee replacement in March 2003, Claimant has simply not worked at all.

25. Second, Claimant has not shown that he or others on his behalf have searched for work and found none. Ms. Puckett found numerous job possibilities which Claimant did not attempt to secure. Claimant did little to pursue employment. He identified only four applications.

26. Finally, Claimant has not shown that any efforts to find work would be futile. His four attempts do not establish futility. The weight of the evidence establishes the opposite.

27. Claimant has not met his burden of proving that he is permanently and totally disabled under any prong of the odd-lot doctrine test.

28. **Attorney Fees.** Defendants paid all medical and income benefits until Dr. Kym declared Claimant medically stable. Claimant did not identify any unreasonable acts by Defendants which might give rise to an award of attorney fees under Idaho Code § 72-804.

CONCLUSIONS OF LAW

1. Claimant's left knee condition was caused by compensable accident;
2. Claimant suffered PPI rated at 15% of the whole person;
3. Claimant suffered a permanent partial disability (PPD) rated at 30% of the whole person, inclusive of PPI;
4. Claimant is not entitled to permanent total disability under the odd-lot doctrine;
5. Claimant is not entitled to attorney fees.

RECOMMENDATION

The Referee recommends that the Commission adopt the foregoing Findings of Fact and Conclusions of Law as its own and issue an appropriate final order.

DATED this 10TH day of December, 2004.

INDUSTRIAL COMMISSION

ATTEST:

/S/_____
Douglas A. Donohue, Referee

/S/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 14TH day of DECEMBER, 2004, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

Scott Chapman
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db

/S/_____